

STATE OF MICHIGAN
COURT OF APPEALS

SANFORD BURKS, a/k/a SAM MACK,

Plaintiff-Appellee,

v

KEVIN JORDAN,

Defendant-Appellant,

and

ANITA BANKS, RONALD DORSEY,
JACQUELINE DORSEY, and DAVID DORSEY,

Defendants.¹

UNPUBLISHED
November 1, 2002

No. 225825
Wayne Circuit Court
LC No. 98-803093-NO

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant, Kevin Jordan, appeals as of right the trial court's final judgment and order which obligated him to pay plaintiff mediation sanctions in the amount of \$23,320.² We reverse and remand.

I. Facts and Procedural History

Burks filed a complaint against defendants, including Jordan, for injuries he suffered during an altercation at a social club. A mediation panel evaluated Burks' case as follows: \$1,000 against Jordan, \$0 against Jacqueline Dorsey,³ \$500 against Anita Banks, \$500 against David Dorsey, \$500 against Ronald Dorsey, and \$500 against Steven Banks, for a total of

¹ Steven Banks was also a defendant in this matter.

² MCR 2.403 was amended, effective August 1, 2000, to change the term "mediation" to "case evaluation." Because the proceedings in this case occurred before the amendment, we use the term applicable at the time of these proceedings. See, e.g., *Marketos v American Employers Ins Co*, 465 Mich 407, 411 n 6; 633 NW2d 371 (2001).

³ The claims against Jacqueline Dorsey were later dismissed.

\$3,000. Plaintiff rejected the mediation evaluation and Jordan was the only defendant to reject the mediation evaluation.

Following the presentation of the evidence at trial, the trial court instructed the jury that, if the jury found defendants liable, it should apportion damages to each defendant. However, unfortunately, the trial court further instructed the jury, erroneously, that, if it could not attribute a percentage of fault to each defendant, it should simply render a lump sum award against all of the liable defendants. The jury returned a joint and several verdict of \$10,000 against Jordan, Anita Banks, Ronald Dorsey, and Steven Banks.

Burks moved for mediation sanctions against Jordan in the amount of \$29,970. The trial court ruled that the verdict was more favorable to plaintiff because the \$10,000 verdict was payable by any one of the four defendants. Accordingly, after striking certain fees attributed to work performed by an unlicensed law school graduate, the trial court entered a final judgment that included \$23,320 in mediation sanctions against Jordan.

II. Analysis

Jordan argues that the trial court erred by awarding mediation sanctions against him because Burks cannot show that the jury verdict was more favorable to him than the mediation evaluation where the jury verdict was joint and several and not apportioned among the parties.

Though both parties assert that this Court reviews a decision to award mediation sanctions for an abuse of discretion, the decision to award mediation sanctions is an issue of law, which we review de novo. See *Dessart v Burak*, ___ Mich App ___, ___ NW2d ___ (2002); *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 218; 625 NW2d 93 (2000); *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). This standard of review is also appropriate because the issue involves the interpretation of a court rule, which we also review de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001).

MCR 2.403(O) governs the liability of a party who rejects a mediation evaluation to pay the opposing party's costs. MCR 2.403(O)(1), as it existed at the time of these proceedings, provided:

If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

A verdict is considered "more favorable" to a plaintiff if it is more than ten percent above the mediation evaluation. MCR 2.403(O)(3). In cases involving multiple parties, if the verdict is based on the parties' joint and several liability, "the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total mediation evaluation as to those defendants." MCR 2.403(O)(4)(b). Burks argues that, because the aggregate verdict, \$10,000, is more than ten percent higher than the aggregate mediation evaluation for the liable defendants, \$2,500, the trial court correctly awarded him costs under MCR 2.403(O)(4)(b).

However, plaintiff's argument ignores MCR 2.403(O)(10), which states:

In an action filed on or after March 28, 1996, for the purpose of subrule (O)(1), a verdict awarding damages for personal injury, property damage, or wrongful death shall be adjusted for relative fault as provided by MCL 600.6304; MSA 27A.6304.

Plaintiff filed this case after our Legislature passed tort reform legislation which requires the jury to determine the percentage of fault of each person liable for the plaintiff's injury. MCL 600.6304. However, because defendant does not challenge the joint and several form of the verdict or the trial court's instruction that the jury should return a joint and several verdict if it was unable to apportion fault, the erroneous form of the verdict is not properly before us. Nonetheless, regarding the award of mediation sanctions, MCR 2.403(O)(10) is unequivocal; for cases filed after March 28, 1996, to award sanctions and to determine whether the verdict is more favorable to the plaintiff, the verdict "*shall* be adjusted for relative fault" (Emphasis added.) This language is mandatory and the verdict must be "adjusted for relative fault" to award mediation sanctions in a personal injury case.⁴

Therefore, the trial court erred by imposing mediation sanctions against Jordan in violation of the clear language of MCR 2.403(O)(10). Accordingly, we reverse the trial court's award of mediation sanctions and remand for further proceedings consistent with this opinion.

Because we reverse the trial court's award, we need not consider Jordan's arguments regarding the costs and fees imposed. However, on remand, we emphasize that, if plaintiff is entitled to mediation sanctions, the court shall award "actual costs," including:

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation. [MCR 2.403(O)(6).]

Further, we underscore that the attorney fees must be "reasonable" and the phrase "necessitated by the rejection" is a temporal demarcation, and costs generated before the rejection are not recoverable. MCR 2.403(O)(6); *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230, 235; 486 NW2d 68 (1992).

⁴ While MCR 2.403(O)(4)(b) appears to conflict with MCR 2.403(O)(10) because it contemplates joint and several verdicts against multiple defendants, MCR 2.403(O)(10) negates the rule for cases filed after March 28, 1996, except for those cases for which joint and several liability continues to apply.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens